

1 ALDEN F. ABBOTT
2 General Counsel
3 BRADLEY DAX GROSSMAN
4 Mass. Bar No. 669358
5 FEDERAL TRADE COMMISSION
6 600 Pennsylvania Ave., NW
7 Washington, D.C. 20580
8 Telephone: 202-326-2994
9 Email: *bgrossman@ftc.gov*

10 *Attorneys for the Federal Trade Commission*

11 **UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA**

13 RICHARD ZEITLIN, et al.,

14 Case No. 2:19-cv-698-JCM-VCF

15 Plaintiffs,

16 v.

17 UNITED STATES FEDERAL TRADE
18 COMMISSION,

19 Defendant.

20 **Response of Defendant Federal Trade
21 Commission to Plaintiffs' Second Notice
22 of Relevant Supplemental Authority**

23 The Federal Trade Commission submits this response to plaintiffs' Notice (ECF No.
24 38) describing two Executive Orders issued in October 2019. Plaintiffs filed these
25 supplemental authorities without seeking leave of court, contrary to LR 7-2(g). Should the
26 Court decide to consider plaintiffs' new filing, the FTC's position is that the Executive
Orders have no bearing on the Court's resolution of this case.

27 Executive Order 13891, "Promoting the Rule of Law Through Improved Agency
28 Documents," does not apply to independent agencies such as the FTC.¹ Plaintiffs
29 nonetheless quote this Order's statement that agencies have improperly "attempt[ed] to
30 regulate the public without following the rulemaking procedures of the APA." ECF No. 38

31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
5510
5511
5512
5513
5514
5515
5516
5517
5518
5519
5520
5521
5522
5523
5524
5525
5526
5527
5528
5529
5530
5531
5532
5533
5534
5535
5536
5537
5538
5539
5540
5541
5542
5543
5544
5545
5546
5547
5548
5549
55410
55411
55412
55413
55414
55415
55416
55417
55418
55419
55420
55421
55422
55423
55424
55425
55426
55427
55428
55429
55430
55431
55432
55433
55434
55435
55436
55437
55438
55439
55440
55441
55442
55443
55444
55445
55446
55447
55448
55449
55450
55451
55452
55453
55454
55455
55456
55457
55458
55459
55460
55461
55462
55463
55464
55465
55466
55467
55468
55469
55470
55471
55472
55473
55474
55475
55476
55477
55478
55479
55480
55481
55482
55483
55484
55485
55486
55487
55488
55489
55490
55491
55492
55493
55494
55495
55496
55497
55498
55499
554100
554101
554102
554103
554104
554105
554106
554107
554108
554109
554110
554111
554112
554113
554114
554115
554116
554117
554118
554119
554120
554121
554122
554123
554124
554125
554126
554127
554128
554129
554130
554131
554132
554133
554134
554135
554136
554137
554138
554139
554140
554141
554142
554143
554144
554145
554146
554147
554148
554149
554150
554151
554152
554153
554154
554155
554156
554157
554158
554159
554160
554161
554162
554163
554164
554165
554166
554167
554168
554169
554170
554171
554172
554173
554174
554175
554176
554177
554178
554179
554180
554181
554182
554183
554184
554185
554186
554187
554188
554189
554190
554191
554192
554193
554194
554195
554196
554197
554198
554199
554200
554201
554202
554203
554204
554205
554206
554207
554208
554209
554210
554211
554212
554213
554214
554215
554216
554217
554218
554219
554220
554221
554222
554223
554224
554225
554226
554227
554228
554229
554230
554231
554232
554233
554234
554235
554236
554237
554238
554239
554240
554241
554242
554243
554244
554245
554246
554247
554248
554249
554250
554251
554252
554253
554254
554255
554256
554257
554258
554259
554260
554261
554262
554263
554264
554265
554266
554267
554268
554269
554270
554271
554272
554273
554274
554275
554276
554277
554278
554279
554280
554281
554282
554283
554284
554285
554286
554287
554288
554289
554290
554291
554292
554293
554294
554295
554296
554297
554298
554299
554300
554301
554302
554303
554304
554305
554306
554307
554308
554309
554310
554311
554312
554313
554314
554315
554316
554317
554318
554319
554320
554321
554322
554323
554324
554325
554326
554327
554328
554329
554330
554331
554332
554333
554334
554335
554336
554337
554338
554339
5543310
5543311
5543312
5543313
5543314
5543315
5543316
5543317
5543318
5543319
5543320
5543321
5543322
5543323
5543324
5543325
5543326
5543327
5543328
5543329
55433210
55433211
55433212
55433213
55433214
55433215
55433216
55433217
55433218
55433219
55433220
55433221
55433222
55433223
55433224
55433225
55433226
55433227
55433228
55433229
55433230
55433231
55433232
55433233
55433234
55433235
55433236
55433237
55433238
55433239
554332310
554332311
554332312
554332313
554332314
554332315
554332316
554332317
554332318
554332319
554332320
554332321
554332322
554332323
554332324
554332325
554332326
554332327
554332328
554332329
554332330
554332331
554332332
554332333
554332334
554332335
554332336
554332337
554332338
554332339
5543323310
5543323311
5543323312
5543323313
5543323314
5543323315
5543323316
5543323317
5543323318
5543323319
5543323320
5543323321
5543323322
5543323323
5543323324
5543323325
5543323326
5543323327
5543323328
5543323329
55433233210
55433233211
55433233212
55433233213
55433233214
55433233215
55433233216
55433233217
55433233218
55433233219
55433233220
55433233221
55433233222
55433233223
55433233224
55433233225
55433233226
55433233227
55433233228
55433233229
55433233230
55433233231
55433233232
55433233233
55433233234
55433233235
55433233236
55433233237
55433233238
55433233239
554332332310
554332332311
554332332312
554332332313
554332332314
554332332315
554332332316
554332332317
554332332318
554332332319
554332332320
554332332321
554332332322
554332332323
554332332324
554332332325
554332332326
554332332327
554332332328
554332332329
554332332330
554332332331
554332332332
554332332333
554332332334
554332332335
554332332336
554332332337
554332332338
554332332339
5543323323310
5543323323311
5543323323312
5543323323313
5543323323314
5543323323315
5543323323316
5543323323317
5543323323318
5543323323319
5543323323320
5543323323321
5543323323322
5543323323323
5543323323324
5543323323325
5543323323326
5543323323327
5543323323328
5543323323329
5543323323330
5543323323331
5543323323332
5543323323333
5543323323334
5543323323335
5543323323336
5543323323337
5543323323338
5543323323339
55433233233310
55433233233311
55433233233312
55433233233313
55433233233314
55433233233315
55433233233316
55433233233317
55433233233318
55433233233319
55433233233320
55433233233321
55433233233322
55433233233323
55433233233324
55433233233325
55433233233326
55433233233327
55433233233328
55433233233329
55433233233330
55433233233331
55433233233332
55433233233333
55433233233334
55433233233335
55433233233336
55433233233337
55433233233338
55433233233339
554332332333310
554332332333311
554332332333312
554332332333313
554332332333314
554332332333315
554332332333316
554332332333317
554332332333318
554332332333319
554332332333320
554332332333321
554332332333322
554332332333323
554332332333324
554332332333325
554332332333326
554332332333327
554332332333328
554332332333329
554332332333330
554332332333331
554332332333332
554332332333333
554332332333334
554332332333335
554332332333336
554332332333337
554332332333338
554332332333339
5543323323333310
5543323323333311
5543323323333312
5543323323333313
5543323323333314
5543323323333315
5543323323333316
5543323323333317
5543323323333318
5543323323333319
5543323323333320
5543323323333321
5543323323333322
5543323323333323
5543323323333324
5543323323333325
5543323323333326
5543323323333327
5543323323333328
5543323323333329
5543323323333330
5543323323333331
5543323323333332
5543323323333333
5543323323333334
5543323323333335
5543323323333336
5543323323333337
5543323323333338
5543323323333339
55433233233333310
55433233233333311
55433233233333312
55433233233333313
55433233233333314
55433233233333315
55433233233333316
55433233233333317
55433233233333318
55433233233333319
55433233233333320
55433233233333321
55433233233333322
55433233233333323
55433233233333324
55433233233333325
55433233233333326
55433233233333327
55433233233333328
55433233233333329
55433233233333330
55433233233333331
55433233233333332
55433233233333333
55433233233333334
55433233233333335
55433233233333336
55433233233333337
55433233233333338
55433233233333339
554332332333333310
554332332333333311
554332332333333312
554332332333333313
554332332333333314
554332332333333315
554332332333333316
554332332333333317
554332332333333318
554332332333333319
554332332333333320
554332332333333321
554332332333333322
554332332333333323
554332332333333324
554332332333333325
554332332333333326
554332332333333327
554332332333333328
554332332333333329
554332332333333330
554332332333333331
554332332333333332
554332332333333333
55433233233333334
55433233233333335
55433233233333336
55433233233333337
55433233233333338
55433233233333339
554332332333333310
554332332333333311
554332332333333312
554332332333333313
554332332333333314

1 at 1 (quoting 84 Fed. Reg. 55235, 55235 (Oct. 9, 2019)). But, as the FTC established in its
 2 Motion to Dismiss and Reply Brief, the 2016 FTC staff letter at issue in this case bore none
 3 of the hallmarks of an agency regulation. The letter only reflected the views of a subordinate
 4 official. Any new FTC regulations (or enforcement actions) must be approved by a majority
 5 vote of the Commission itself, which never even considered the issue. *See* ECF No. 19 at 12-
 6 15; ECF No. 28 at 3-5. The staff letter also carried no legal force: In any future enforcement
 7 case, the tribunal would need to decide whether the defendant violated the Telemarketing
 8 Sales Rule (TSR)—which, in relevant part, has not changed since 2008—regardless of the
 9 views expressed in the 2016 staff letter. *See* ECF No. 19 at 15-16; ECF No. 28 at 5-6.

10 Plaintiffs also cite Executive Order 13892, “Promoting the Rule of Law Through
 11 Transparency and Fairness in Civil Administrative Enforcement and Adjudication,” which
 12 does apply to independent agencies. This Order principally requires that agencies “establish
 13 a violation of law by applying statutes or regulations” and forbids them from “treat[ing]
 14 noncompliance with a standard of conduct announced solely in a guidance document as
 15 itself a violation of applicable statutes or regulations.” 84 Fed. Reg. 55239, 55240 (Oct. 9,
 16 2019).² But plaintiffs do not allege that the FTC has ever treated the 2016 staff letter as the
 17 governing standard of conduct in an enforcement action. As discussed above, in any
 18 enforcement case the FTC would establish law violations by applying the TSR’s 2008 ban
 19 on “prerecorded message[s],” 16 C.F.R. § 310.4(b)(1)(v), and therefore would not proceed
 20 on the basis of “a standard of conduct announced solely in a guidance document.” 84 Fed.
 21 Reg. at 55240.³

22

23

24 ² This Order does not “create any right or benefit, substantive or procedural, enforceable”
 25 against the United States or its agencies. 84 Fed. Reg. at 55242.

26 ³ The 2016 staff letter does not even qualify as a “guidance document” subject to this
 Executive Order, since it is not an “agency statement of general applicability,” 84 Fed. Reg.
 at 55240, but only reflects the views of staff.

Although Zeitlin seeks to rely on Executive Order 13892’s definition of a “legal consequence” (ECF No. 38 at 2), the Order did not overturn Ninth Circuit precedent holding that advisory guidance does *not* produce legal consequences simply because it may result in “a greater risk of increased fines” by placing a party on notice of its legal duties. ECF No. 28 at 6 (quoting *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 595 (9th Cir. 2008)).

Respectfully submitted,

NICHOLAS A. TRUTANICH
United States Attorney

ALDEN F. ABBOTT
General Counsel

BRIAN W. IRVIN
Assistant United States Attorney

JOEL MARCUS
Deputy General Counsel

501 Las Vegas Boulevard South
Suite 1100
Las Vegas, Nevada 89101
702-388-6336
brian.irvin@usdoj.gov

/s/ Bradley Grossman
BRADLEY DAX GROSSMAN
Attorney
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Tel.: (202) 326-2994
Email: bgrossman@ftc.gov

Dated: December 20, 2019

Certificate of Service

2 I hereby certify that on December 20, 2019, I electronically filed and served the
3 foregoing RESPONSE TO PLAINTIFFS' SECOND NOTICE OF RELEVANT
4 SUPPLEMENTAL AUTHORITY with the Clerk of the Court for the United States
5 District Court for the District of Nevada using the CM/ECF system.

/s/ Bradley Grossman
BRADLEY DAX GROSSMAN
Attorney, Federal Trade Commission